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No. 95-191

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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SUMMARY OF ARGUMENT

Elrod, Branti and *Rutan* mark a departure from this Court's prior decisions in *Public Worker's v. Mitchell*, 330 U.S. 75 (1947); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and more recent decisions in *United States v. National Treasury Employers Union*, __ U.S __, 115 S. Ct. 1003 (1995) and *Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994). Instead of the deferential approach employed in this line of cases, *Elrod, Branti* and *Rutan* apply a strict scrutiny standard when analyzing First Amendment issues arising out of state and local employment.

The strict scrutiny standard should not be extended to this First Amendment case arising from Petitioners' work as an independent contractor in the City of Northlake. Such an extension of *Elrod, Branti* and *Rutan* in this case is not only inconsistent with the deferential approach described above, it also raises unworkable problems for local governmental entities and for the judiciary, restricting both in their effectiveness and efficiency.

However, even if the strict scrutiny standard were applied here, Northlake did not unconstitutionally infringe on Petitioners' First Amendment rights. Northlake's action was, in fact, narrowly tailored to further a vital governmental interest. Northlake has no other effective means to further the vital governmental interest of providing effective and efficient municipal services unless it has the power to terminate or not renew relationships with independent contractors pursuant to which such services are provided.

Likewise, if the exception (recognized by *Elrod, Branti* and *Rutan*) to the strict scrutiny standard is applied, Northlake did not unconstitutionally violate Petitioners' First Amendment

rights. As independent contractors, who operate without supervision from the City of Northlake, Petitioners are analogous to the high ranking employees described in *Branti* and *Rutan* who may be dismissed for political reasons without violating the First Amendment.

Under any First Amendment analysis, whether it be the deferential approach, the strict scrutiny test, or the exception thereto, Petitioners fail to state a claim. In addition, this Court may consider overruling at least *Rutan*, if not *Elrod* and *Branti*, as an alternative to extending those decisions into the context of First Amendment issues that arise between governmental entities and independent contractors. For all of the foregoing reasons, this Court should affirm the decision below of the Seventh Circuit Court of Appeals.

ARGUMENT

I.

THE *ELROD, BRANTI* AND *RUTAN* HOLDINGS SHOULD NOT BE EXTENDED TO INDEPENDENT CONTRACTORS.

This case, along with *Umbehr v. McClure*, 44 F. 3d 876 (10th Cir. 1995) (94-1654, argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*), provides this Court, for the first time, the opportunity to address the issue of what, if any, First Amendment rights an independent contractor has in the context of performing work for a governmental entity.

Prior hereto, this court has addressed the issue of First Amendment rights in the limited context of a governmental employer/employee relationship. In that context, this Court has

struggled mightily with attempting to fashion not only a test to be applied in determining whether a constitutional violation has occurred but also in determining to whom such a test should be applied.

For example, in *Elrod v. Burns*, 421 U.S. 347 (1976), this Court, in a plurality opinion, decided that a newly elected sheriff could not constitutionally replace certain office staff personal with members of his own party when the employees being replaced failed to support or affiliate with the party in power. Support for that holding was found in *Perry v. Sindermann*, 408 U.S. 593 (1972), which held that the state's refusal to renew a teacher's contract because he had been publicly critical of its policies, imposed an unconstitutional condition on the receipt of a public benefit. Nonetheless, the plurality in *Elrod* did acknowledge that a government has a significant interest in insuring that it has effective and efficient employees.

This Court arrived at a similar conclusion in *Branti v. Finkel*, 445 U.S. 507 (1980), even though it decided that the First Amendment prohibited a newly appointed public defender from firing assistant public defenders because they did not support the party of which the newly elected public defender was a member.

In both *Elrod* and *Branti* this Court carved out exceptions for certain employees. The exception outlined in *Elrod* provided that policymaking employees or employees in confidential positions could be dismissed on the basis of their political views. *Elrod, supra*, 421 U.S. at 367. In *Branti*, the court found that a state demonstrates a compelling interest for political firings when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti, supra*, 445 U.S. at 518.

The third in this line of cases is *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In that case, a sharply divided court extended the holdings in *Elrod* and *Branti* to promotion, transfer, recall and hiring decisions based on party affiliation and support. The exceptions found in *Elrod* and *Branti* were not an issue in *Rutan* as it was conceded that the employees involved in *Rutan* would not fall within the exceptions. *Id.* at 71, footnote 5.

However, this Court, in *Rutan*, was sharply divided with Justice Scalia, who was joined by the Chief Justice and Justice Kennedy, in whole, as well as by Justice O'Connor, in part, authoring the dissent. In his dissent, Justice Scalia observed:

> Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

Id., at 94.

As cogently observed by Justice Scalia:

> Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way as it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and

> what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights are designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, wide spread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.

Id., 95-96.

It is in that context that this case, involving whether a governmental entity may for political reasons terminate the services of an independent contractor, must be decided. Respondents submit that such considerations are constitutionally permissible and for this Court to hold otherwise would do nothing more than foster uncertainty, indecision, and second guessing which would result in the federal judiciary being inundated with lawsuits by any independent contractor who felt that the decision to retain or not retain its services was politically motivated. This Court's decisions in *Elrod, Branti* and *Rutan* should not be extended to independent contractors.

The *Rutan* dissent and the weight of persuasive authority in the better reasoned opinions in the Courts of Appeals support that result.

A. Extending *Elrod*, *Branti* And *Rutan* Raises Unworkable Problems For Governmental Entities, Unnecessarily Restricting Their Effectiveness And Efficiency.

The first circuit to address this issue in the context of independent contractors was the Eighth Circuit in the cases of *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) and *Fox and Co. v. Schoemehl*, 671 F.2d 303(8th Cir. 1982),

In *Sweeney*, the plaintiffs alleged their dismissals were based solely on their political affiliation and argued they were protected from such dismissals by the holdings in *Elrod*, *supra* and *Branti*, *supra*. In deciding that the plaintiffs in *Sweeney* did not fall within the protection of *Elrod* and *Branti*, the Eighth Circuit found it dispositive that those two Supreme Court decisions were limited to dismissals of *public employees* for partisan reasons. *Id.*, at 545. Consequently, the Eighth Circuit was "not willing to extend the patronage decisions to cases which do not involve public employees." *Id.*, at 545. As a result, once it was determined that the fee agents in *Sweeney* were not public employees but more in the nature of independent contractors, the trial court's holding that the plaintiffs were not protected from dismissal based on political affiliation was affirmed.

The Seventh Circuit has, in a line of cases culminating in the instant case, repeatedly held that independent contractors are afforded no protection from removal based on political considerations. The first such case was *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U. S. 1044 (1984). In that case the plaintiff had submitted a bid to the city of

Springfield on behalf of his business to install and maintain benches along city streets. He alleged that his bid was the most favorable to the city but that, nonetheless, the mayor had the contract awarded to another bidder who was one of the mayor's political supporters while the plaintiff was not. The district court dismissed plaintiff's complaint and that dismissal was affirmed by the Seventh Circuit.

In affirming the district court's dismissal, the Seventh Circuit observed that the practice of favoring political supporters and awarding contracts for public projects has a long history at the federal as well as the state and local levels. It acknowledged as hardly open to question that such a practice could interfere with the free expression of political views whether directly or through its effect on campaign contributions. *Id.*, at 293. Nonetheless, the court considered the extent of the likely interference as being outweighed by the consequences of trying to prevent it through an interpretation of the Constitution and held that political considerations in the awarding of public contracts to independent contractors are permissible.

The Seventh Circuit noted that it is not the end of world if a government contractor does not get the particular government work which it seeks due to the fact that the contractor is on the outs with the incumbent as there are other sources of business for such contractors. Of note in that regard is that the Petitioners herein apparently have many sources of business as alleged in their complaint. (*See* appendix to Petition for Writ of Certiorari, page 21a) In paragraph two of Petitioners' First Amended Complaint, they allege that "O'Hare Truck Service, Inc., in addition to other services, provides towing services at the request of municipalities throughout Cook and DuPage counties." It is apparent that Petitioners rely only partially on any income from towing services received by being on the rotation list in Northlake.

The Seventh Circuit further observed that because at least some government work is dispensed on a partisan basis, "modern American life has made it important for business firms to be on good terms with the major political groupings in the society. It seems unlikely that the cautious neutrality that characterizes the politics of American business would be altered even by an ironclad constitutional rule against allowing politics to influence the contracting process." *Id.*, at 294. That court further went on to explain:

> To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaign, and decisions such as *Elrod* and *Branti* have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it still further raises profound questions of political science that exceed judicial competence to answer . . . *we are reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here.*

Id., at 294 (emphasis added)

The court also noted there was a practical consideration in

its decision, that being that to hold otherwise would invite every disappointed bidder for a public contract to bring a federal lawsuit against the governmental entity involved. That could literally occur with respect to any item of governmental work performed by independent contractors as in virtually every instance there is more than one entity competing for that work.

The next Seventh Circuit case addressing this was *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S.845 (1990). Triad was a security firm hired by the Chicago Housing Authority to provide security services beginning in 1982. After a change of administrations in Chicago, Triad alleged that the CHA began to intimidate, harass and ultimately drive it and other white employees and contractors from the ranks of the CHA and replace them with black employees and contractors who supported the political aspirations of the new administration. Triad filed a seven count complaint against the CHA, one of which alleged that the CHA's actions violated Triad's rights of free association and speech as guaranteed by the First and Fourteenth Amendments, allegations which are essentially the same as the Petitioners' allegations in this case.

Although the Seventh Circuit noted that the *Triad* case was not factually parallel to the circumstances in the *LaFalce* case it emphasized that the rationale underlying that decision was the difference that existed with respect to the business relationship of the parties involved. In affirming the district court's dismissal of Triad's First Amendment claim, the Seventh Circuit held that:

> The decisions in both *LaFalce* and *Horn* were grounded upon the distinction between "independent contractors" and "public employees" and the extent to which this distinction was dispositive of the First

> Amendment issue. In that Triad is an "independent contractor" we, hold that our decision in *LaFalce* is binding and that Triad is not protected under the First Amendment in this context.

Id., at 588.

Petitioners have conceded in this Court that they are independent contractors as far as their relationship with the City of Northlake is concerned. *See* Petitioners brief, page 9. Consequently, as correctly decided in the court below, petitioner's First Amendment claims should properly be rejected. The Seventh Circuit, *subsequent* to this Court's *Rutan* decision once again affirmed its position with respect to independent contractors in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), *cert. denied*, 502 U.S 1005 (1991). In again refusing to extend the *Elrod* and *Branti* decisions to independent contractors despite the then recent holding in *Rutan*, the Seventh Circuit stated:

> While recognizing that *Rutan* has altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based, we affirm the continued validity of those earlier cases. *Rutan* did extend First Amendment protection, but only within the context of government employment . . . we continue to concur in the view taken by the other circuits and hold that political favoritism in the awarding in public contracts is not actionable.

Id., at 710.

As was very eloquently observed by the Third Circuit Court of Appeals in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), when that court affirmed a motion for summary judgment in favor of various state of New Jersey officials and against independent contractors who were individuals removed from their positions solely because of their political affiliation:

> . . . [We] embrace the proposition that application of the First Amendment has never been considered as absolute dogma that runs roughshod over other fundamental values. We recognize that in adding the formidable gloss to the naked constitutional text of "Congress shall make no law . . ." the courts have applied a balancing approach. Having weighed interests implicated here, we are persuaded first, that the independent contractors in this case differ in significant respects from public employees and, second, that the distinctions lead to different first amendment treatments of the two classifications. As the force of a first amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the Republic was formed.

Id., at 677.

The Sixth Circuit Court of Appeals has also considered and followed these cases in *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207 (6th Cir. 1990), *reinstated in part*, 924 F.2d 627 (6th Cir. 1991) (*en banc*).

Affirming the Seventh Circuit's decision below eliminates the potentially "disastrous results" predicted by Justice Scalia in his *Rutan* dissent. For example, once a municipality lets an independent contract, its problems are not limited to First Amendment suits from unsuccessful bidders. The successful bidder could later seek a rate increase and simultaneously, publicly endorse the opposition. If the contract would then not be renewed by the incumbent, but instead was given to a lower bidder; under Petitioners' theory, the municipality would face a First Amendment claim alleging that the contract was not renewed in retaliation for expression of political views or for political association.

Furthermore, because most independent contracts are of limited duration, every new administration will have occasion to review, terminate or renew contracts made by the preceding administration. If a new administration decides to terminate or not renew its predecessors' contracts; under Petitioners' analysis, each such decision will subject each new administration to a federal First Amendment lawsuit. There is no basis in the Constitution to so encumber the governmental decision-making process. Presumably, the electorate expects change when voting in a new administration. The First Amendment should not provide vague and abstract restrictions on a new administration's efforts to carry out such a mandate.

For example, administrations are often voted out because of the electorate's perception that public services are inadequate. This is true whether the voter perception is accurate or not. Under Petitioners' analysis, an independent contractor who provided any of those public services and was replaced by the new administration would have the basis for filing a First Amendment lawsuit because, from its perspective, the only thing that changed was the administration. Therefore, contract non-renewal would have been based solely on political association

with the prior administration. Under this scenario, the new administration should not have to defend such First Amendment claims for simply following the expressed will of the electorate.

Finally, the government loses direct control over a job that has been assigned to an independent contractor. The contractor becomes vested with the right to control the manner and method of how that job is carried out on a day to day basis. As a result, the government must retain some method of controlling the independent contractor without having to wait for a disruption of some type in service. *See Vickery v. Jones*, 865 F. Supp. 1313 (S.D.Ill. 1994), *appeal pending*, Nos. 96-1055, 96-1153 (7th Cir.). It is the government that is looked to by its citizens for the provision of certain public services and it is the government that is held accountable for any problems in the provision of those services. Consequently, control over independent contractors must be exercised by the government without having to resort to some tortured First Amendment analysis each time the services of a specific independent contractor are no longer needed or desired. As Justice Scalia commented in his dissenting opinion in *Rutan*:

> In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

Rutan, supra, 497 U.S at 110.

B. Such An Extension Of *Elrod*, *Branti* And *Rutan* Raises Unworkable Problems For The Judiciary Restricting Its Effectiveness And Efficiency.

The Tenth Circuit's recent decision in *Umbehr, supra*, acknowledges that its decision places it squarely in conflict with several other circuits. The *Umbehr* court's holding that an "independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be" (*Umbehr, supra*, 44 F.3d at 883) is unworkable and will lead to a never-ending stream of lawsuits by any disgruntled contractor who has or was interested in doing work for a governmental entity but which no longer was doing so.

On balance, extending the holdings in *Elrod, Branti* and *Rutan*, to also apply to independent contractors who work for governmental entities, would foster unlimited litigation due to the uncertainty in attempting to apply whatever rule of law that might be fashioned in this context. This is evidenced by making a simple comparison between the very small number of First Amendment cases involving independent contractors and the virtually unlimited number of First Amendment cases involving disputes between government employees and government employers.

The ensuing flood of litigation would not be limited only to independent contractor cases. These same issues will have to be considered in the context of state or local governments and their part-time as well as their temporary employees. In fact, these very issues are now pending before the Seventh Circuit Court of Appeals in *Tarpley v. Jeffers, et al.* (7th Cir. Docket No. 95-2084) and in *Vickery v. Jones, supra*. There are a myriad of part-time and temporary employment decisions that, according to Petitioners, would also be subject to First Amendment claims under *Elrod, Branti* and *Rutan*.

To extend First Amendment protection to independent contractors in this context as is advocated by the Petitioners would only provide further extremely fertile grounds for future litigation, but any potential chilling effect on First Amendment rights by refusing to extend these rights to this case would be, in Justice Scalia's words, not a "significant impairment of free speech or free association." Consequently, the *Elrod, Branti* and *Rutan* line of cases should not be extended to independent contractors and this Court should affirm the Seventh Circuit's opinion below which so holds.

II.

ASSUMING, *ARGUENDO*, THIS COURT FASHIONS A FIRST AMENDMENT TEST APPLYING TO INDEPENDENT CONTRACTORS, IT SHOULD BE ONE BASED ON A "REASONABLENESS" RATHER THAN A "STRICT SCRUTINY" STANDARD.

There is ample precedent for applying a reasonableness standard in this context. Long before the *Elrod* decision, this Court had, in upholding legislation prohibiting political activities by federal employees, stated that it was not necessary that the activity regulated be anything more than an activity *reasonably* deemed by Congress to interfere with the efficiency of public service. *See Public Workers v. Mitchell*, 330 U.S. 75 (1947). Likewise, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court upheld restrictions on state employees even though those restrictions were directed at political expression that, if it had been engaged in by private individuals, would have been protected by the First Amendment.

Similarly, a balancing test in the context of an adverse employment action against a public employee because of his speech was fashioned in *Pickering v. Board of Education*, 391 U.S. 562 (1968), where this Court stated:

> . . . the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.

Id., at 568.

More recently, in *Connick v. Meyers*, 461 U.S. 138 (1983), this Court gave a wide degree of deference to the employer's judgment when applying that balancing test. Most recently in *United States v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003 (1995) and *Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994), this Court again showed deference in the governmental employment context. So too, a governmental entity should be given wide deference in its decision-making process with respect to independent contractors.

Despite the reasonableness standard evidenced in the public employer/employee free speech setting, the case law has unfortunately evolved to the application of a "strict scrutiny" standard in the public employer/employee freedom of association setting. *See Elrod, Branti, Rutan, supra.* In *Rutan* the five to four majority opinion written by Justice Brennan decided that "unless these patronage practices are narrowly tailored to further vital governmental interests, we must conclude that they impermissibly encroach on First Amendment freedoms." *Rutan, supra*, 497 U.S at 74. As Justice Scalia points out in his dissenting opinion, "that strict scrutiny standard finds no support in our cases." *Id.*, at 98.

As stated above, Respondents urge this Court not to, in the instant case, extend the *Elrod, Branti* and *Rutan* line of cases. Assuming, *arguendo*, this Court decides to adopt any test at all, the test that should be applied in the independent contractor context should be one of reasonableness and deference under *Pickering* and its progeny, not the strict scrutiny test applied in *Rutan*. Nonetheless, even under the heightened standard applied in *Rutan*, Petitioners' removal from the towing rotation list would not violate Petitioners' First Amendment rights.

The strict scrutiny standard within *Elrod, Branti* and *Rutan* provides that unless patronage practices are narrowly tailored to further government interests, they impermissibly encroach on First Amendment freedoms. *Rutan, supra*, 487 U.S. at 74

With an independent contractor, a municipality can only effectively control conduct through the right to terminate or the right to not renew the contract. *See Vickery v. Jones, supra.* Any limitation on governmental ability to terminate, or not rehire, an independent contractor effectively destroys governmental ability to control public services. This right to terminate or not rehire is narrowly tailored; it is the only effective method available of government control over independent contractors. The right to terminate or not rehire furthers a vital governmental interest: efficiency and effectiveness of operation.

Section I, *ante*, demonstrates numerous examples and practical considerations showing the right to terminate or not rehire an independent contractor furthers efficient and effective governmental operation. Those examples apply equally, but need not be restated, here. Therefore, because the right to terminate or not rehire is narrowly tailored and relates to a vital governmental interest, Respondents' actions here do not violate the First Amendment even under strict scrutiny analysis.

In addition, the policy maker/confidential employee exception to this strict scrutiny standard outlined by this Court in *Branti* recognized that:

> party affiliation may be an acceptable requirement for some government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. In sum, the ultimate inquiry is not whether the label "policy maker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, supra, 445 U.S. at 517-518.

Under that exception, a wide range of public employees have been found to hold positions in which the government was able to "demonstrate that party affiliation is an appropriate requirement for the effective performance" of the particular job involved. Those included a deputy sheriff (*Breuer v. Hart*, 909 F.2d 1035 [7th Cir. 1990]); a secretary to a police chief (*Soderstrum v. Town of Grand Isle*, 925 F.2d 135 [5th Cir. 1991]); a deputy clerk (*Stegmaier v. Trammell*, 597 F.2d 1027 [5th Cir.1979]); and a subdistrict superintendent for a highway department (*Selch v. Letts*, 5 F.3d 1040 [7th Cir., 1993]).

It should be without question that the political loyalty of independent contractors who perform governmental services is

related to the effective performance of the function involved. Since they do not have supervisors who monitor their work, they are similar to supervisors or decision makers which *Branti* allowed to be selected or dismissed based on political affiliation. *See also, Vickery v. Jones, supra.*

The Seventh Circuit, in affirming the dismissal of the subdistrict highway superintendent in *Selch*, stated:

> Elected officials cannot implement the policies that they were elected to carry out and, hence, the will of the electorate cannot be effectuated, unless the officials can install their political allies in the most sensitive jobs. *Id.*, at 1044. While there is no indication that Selch would not effectively perform his duties, "actual disruption nor disturbance need not be proved" (citation omitted) once the employee is classified (as exempt for First Amendment protection), he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently.

Id., at 1046-1047.

This observation is underscored by the *Connick* Court's statement that "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick, supra*, 461 U.S. at 152.

One of Selch's responsibilities was to handle various requests with respect to street maintenance and repairs, etc. The Seventh Circuit noted significant evidence in political life that

the failure to properly provide services such as snow removal from highways could adversely impact on the chief executive of a state or a government charged with providing such services. In particular, the Seventh Circuit observed that the incumbent is widely regarded as having lost the 1979 Chicago Mayoral election due to snow removal problems.

That concept is of import in the instant case where an independent contractor is providing public services to the citizens of Northlake. As noted previously, an independent contractor has little or no supervision over the manner or method in which it performs its job. That coupled with Petitioners' open support for Mayor Paxson's opponent (placing opposition campaign posters in Petitioners' place of business) certainly provides Petitioners with the opportunity, in providing public services, to adversely impact the chief executive of Northlake, who is charged with providing those public services. In particular, as alleged by Petitioners in their First Amended Complaint (*see* Petition for Writ of Certiorari, page 21a), the public service being provided is "when the need arises for the towing of a vehicle, as a result of an accident, mechanical breakdown, abandonment or other reason, plaintiff (Petitioner) is contacted by the municipality where the vehicle is located and asked to provide towing services."

As the *Selch* court teaches, actual disruption or disturbance need not be proved. Once an employee is classified as exempt from First Amendment protection, political firings are constitutionally permissible even without actual evidence of disloyalty or incompetence. Similarly, in the instant case, the City of Northlake is not required to wait and see if the Petitioners, once the candidate they supported was defeated, would for political reasons attempt to disrupt or otherwise adversely affect municipal services.

As indicated above, however, it is Respondents' position that if this court decides to apply a test in this area, it should be the reasonableness and deferential test discussed in *Pickering* and its progeny. That should be so whether the issue is freedom of speech or freedom of association. As observed by Justice Scalia in his *Rutan* dissenting opinion, "since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," (citation omitted), it follows, *a fortiori*, that the government may dismiss an employee for political affiliation if "reasonably necessary to promote effective government." (citing *Public Workers v. Mitchell, supra* and *Brown v. Glines*, 444 U.S 348 [1980]).

As demonstrated above, under any test this Court may fashion, there is no First Amendment violation, and therefore this Court must affirm the Seventh Circuit's opinion below, which so holds.

III.

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO OVERRULE WHAT HAS BECOME UNWORKABLE PRECEDENT IN *RUTAN*, IF NOT IN *ELROD* AND *BRANTI* AS WELL.

It is difficult to find a more unworkable rule of law than that which has evolved from the *Elrod, Branti* and *Rutan* line of cases. The inconsistencies which these cases have spawned are discussed in considerable detail by Justice Scalia in his dissenting opinion in *Rutan, supra* at 111-113. If those and subsequent cases are not reason enough to overrule that line of cases, then the mere consideration that the line of cases could be extended to independent contractors, part-time and temporary employees should most certainly convince one of that necessity.

As observed by Justice Scalia, the "test" devised to implement *Branti* has produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the non-patronage rule and its exception, *Rutan, supra*, 497 U.S. at 112.

Obviously, this Court should not treat lightly a request to overrule past precedent in light of not only the importance, but the necessity, of the doctrine of *stare decisis*. Nonetheless, when a rule of law becomes unworkable, it should be corrected. As stated by Justice Scalia:

> Even in the field of constitutional adjudication where the pull of *stare decisis* is at its weakest, see *Glidden Company v. Zdanok*, 370 U.S. 530, 543 (1962)(opinion of Harlan, J.), one is reluctant to part from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice then all reluctance ought to disappear.

Rutan, supra, 497 U.S. at 110-111.

In discussing the subject of party-based employment Justice Scalia makes this cogent observation on how that subject would be dealt with if these cases were overruled and why the federal judiciary should not be involved in dealing with this subject:

> The answer to that (party-based employment) will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year . . . the appropriate "mix" of party-based employment is a political question if ever there was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

Rutan, supra 497 U.S. at 113-114.

Before continuing to subject state and local governments, and their political officials, to such an unworkable framework as has evolved from the *Elrod, Branti* and *Rutan* line of cases in the public employment context; and certainly before extending that line of cases to include independent contractors, this Court should re-evaluate the wisdom of continuing to enforce the legal theories which originated, and have evolved from, those cases. In doing so, the wisdom of placing the subject of party-based employment back into the hands of the voters and their elected representatives, to be decided at the state and local level, becomes apparent.

Respondents defer to the Brief of Illinois State Officials as *Amicus Curiae* for more detailed argument on this issue.

CONCLUSION

Petitioner's invitation to this Court to extend the *Elrod, Branti* and *Rutan* line of cases to give First Amendment protection to independent contractors should be rejected as unworkable and untenable. The *Rutan* dissent together with the weight of persuasive authority in the Circuit Courts of Appeals provide this Court with sound and reasoned precedent to reject Petitioners' arguments and affirm the ruling below of the Seventh Circuit Court of Appeals.

Any other conclusion will result in giving independent contractors unfettered access to the courts by giving every disappointed independent contractor the ability to file a lawsuit based on the First Amendment. The potential for uncertainty in the law if any such extension is made is evident when considering not only the number, but also the inconsistent results, in First Amendment cases that have been decided since *Elrod* in the employment context. Such uncertainty can, and should, be avoided by this Court affirming the ruling of both the District Court and the Court of Appeals below which dismissed Petitioners' First Amendment challenge on the basis of their status as independent contractors.

If this Court decides to extend independent contractors any First Amendment protection at all, the applicable analysis is one of reasonableness and deference as espoused by this Court both prior and subsequent to the *Elrod, Branti* and *Rutan* line of cases. Under such an analysis, Petitioners fail to state a claim. Likewise, even under the *Elrod, Branti* and *Rutan* strict scrutiny test or its exception, Petitioners fail to state a claim.

Finally, before this Court decides to extend the *Elrod* line of cases to independent contractors who work for governmental entities, the Court should evaluate and review the unworkable framework and unpredictable results that have occurred in this area of the law. In so doing, this Court has the opportunity to overrule *Rutan*, if not *Elrod* and *Branti* as well and return the subject of party-based employment to the hands of the voters and their elected representatives to be decided at the state and local level.

For all of the above reasons, the decision of the Seventh Circuit Court of Appeals and the District Court for the Northern District of Illinois both of which rejected Petitioners' First Amendment claims, should be affirmed.

Respectfully submitted,

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